Award No. 2208
Docket No. 1959
2-MKT-CM-'56

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Edward F. Carter when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 8, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement other than Carmen were improperly used to rerail and repair freight cars making them sound for operation on September 26, 27 and 28, 1954 at Mile Post 263.

2. That accordingly the Carrier be ordered to additionally compensate the following named Carmen:

R. B. Marshall
O. C. Sharp
J. B. Woods
M. L. Robinette
M. P. Eskew

each in the number of hours pay at straight time and time and one-half rate they are entitled to as a result of other than Carmen being used to perform the work set forth in Part 1.

EMPLOYES' STATEMENT OF FACTS: On September 25, 1954, on a sub-division, known as the Texas Central, running west out of Waco, Texas (mile post begins) to Rotan, Texas, a distance of 267 miles, or Mile Post 267, is owned and operated by the Missouri-Kansas-Texas Railroad Company, Missouri-Kansas-Texas Railroad Company of Texas, and is covered by Agreement No. DP-170, effective September 1, 1949. One freight train operates each way every 24 hours. On September 25, 1954, approximately 10:00 P. M., west bound freight train, 263 miles (Mile Post 263) west of Waco, Texas, derailed the first three cars behind the diesel engine. The three cars involved were empty cars. A mechanical department foreman employed at Stamford, Texas (Mile Post 227), 3 section foremen and 6 section men were used to perform the work necessary to place these cars in operating

The various Divisions of the Board have also held that the proper penalty for loss of work to which entitled and for which they are available or can be made available is the pro rata rate of pay and not the punitive rate.

No agreement rule has been cited by claimants and none will be found providing for payment for alleged travel time claimed but not actually performed. In the absence of a rule authorizing payment of travel time not performed there is no way that allowance can properly be made. The various Divisions of the Board have consistently recognized and held they are without authority to allow claims in the absence of supporting agreement rule or to change agreement rules but must apply them as written and agreed to by the parties.

This claim is in fact a request for an interpretation of the rule that would require the carrier to call and use carmen for all wrecks and derailments outside of yard limits contrary to the clear and unambiguous language of the rule, which is not subject to interpretations, and would have the effect of changing the rule without formal notice, conference and negotiation as provided in Section 6 of the Amended Railway Labor Act. The various Divisions of the Board have consistently recognized and held they are without authority to amend or change the rules, which this alleged claim is designed to do and would do if sustained.

As neither the alleged claim appealed to the Board has been presented to and handled with the carrier, nor the claim presented to and handled with the carrier has been appealed to the Board, and neither claim is supported by the facts and evidence, the carrier requests the alleged claim be dismissed or denied.

Except as expressly admitted herein, the carrier denies each and every, all and singular, the allegations of the petitioner's claim, original submission and any and all subsequent pleadings.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, find that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

On September 25, 1954, at about 10:00 P. M., a westbound freight train derailed the first three (3) cars behind the Diesel locomotive about two hundred and sixty-three (263) miles west of Waco, Texas. Carrier used a Mechanical Department foreman, three (3) section foremen and six (6) section men to rerail the cars and put them in operating condition. The organization contends that the work belongs to carmen and the five (5) claimants demand compensation for the time they lost.

This claim was originated by a letter from the general chairman to the general master mechanic under date of November 6, 1954. The claim was made "account of section men rerailing three cars." The letter further states: "It is and has been the duties of carmen to perform such work down through the ages and it is our opinion that these men should have been called and used instead of using men from another craft to do wrecking work * * * ." No claim was made that any employes used had performed the work of repairing cars.

In the subsequent handling of the claims with the chief mechanical officer and the assistant general manager the claim is for section men being used to rerail three (3) empty box cars. No mention is made of any employes performing car repair work at the scene of the derailment. The discussion had on the property as shown by the correspondence between the parties was whether the carmen at Waco should have been used to rerail these cars.

When notice was given of an intention to bring the dispute to this Board the claim was changed to read that "other than carmen were improperly used to rerail and repair freight cars making them sound for operation * * *." For the first time, on the appeal to this Board, the organization injected the question of the repairing of freight cars at the scene of the derailment. This constitutes a variance in the issues. No claim for the repair of cars at the scene of the derailment having been handled on the property, this Board is without authority to hear and determine it.

The rule is stated in Award 1471 as follows:

> "The organization may not start a claim on one basis and, when it fails, change the nature of the claim on appeal. If such a variance in the issue were to be permitted, the parties could never be certain of the precise matters determined on the property. They may not be one thing on the property and something else before this Board."

See also Awards 1236, 5077, Third Division; 9818, 9819, 15757, 16203, 16338, First Division.

The foregoing situation appears to have been recognized by the organization's assistant to the president. On August 17, 1955, the general chairman wrote a letter to the latter stating that he had conferred with carrier on the amended aspects of the claim. This letter was a self serving one. There is no evidence that the claim was amended. Nor is there any evidence in the record indicating that carrier's highest officer designated to handle disputes had any notice of the changed claim. Nor is there any evidence that carrier waived the filing of a new claim in accordance with the usual method of handling. If there was an attempt to change the nature of the claim, it was orally made. This is not sufficient. The rule is correctly stated in Award 16082, First Division, as follows:

> "On the basis of Award 14425, Referee Whiting, and Award 15757, Referee Carter, we are constrained to dismiss the claim as not having been properly brought before this Division because we find as a fact that the claim having been originally written in one form was conferred on orally and was first amended in writing when it was submitted to this Division."

We are obliged to hold that the claim made to the Board, based on car repair work performed at the scene of the derailment, is not properly before the Board and is dismissed.

With reference to that part of the claim that carmen only can rerail locomotives and cars outside of yard limits, we hold against the claimants. Where wrecking crews are called for wrecks or rerailments outside of yard limits, carmen regularly assigned to a wrecker crew are entitled to the work under Rule 67 (c). But in the present case, the wrecker outfit was not called. In fact, claimants were not even assigned to the wrecker crew. When a wrecker outfit is not called, the rerailing of locomotives and cars is not the exclusive work of carmen. Awards 2049, 1763, 1757, 1482, 1322. The claim for rerailing the cars is not valid.

AWARD

Dismissed in part; denied in part.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 6th day of August, 1956.